No. 93-142

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DONALD R. BURKS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the petitioner was deprived of his due process right to present a defense when the military trial judge excluded from evidence a statement in which another person admitted to committing the murder for which the petitioner was convicted.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Donald R. Burks, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on April 29, 1993.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals is reported at 36 M.J. 447 (C.M.A. 1993) (Appendix A). The unreported opinion of the United States Air Force Court of Military Review, issued on August 26, 1991, is found at Appendix B.

JURISDICTION

The final order of the United States Court of Military Review was entered on April 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Sgt. Joseph Handy was brutally murdered during the early morning hours of 25 September 1989 while he was at work at George AFB, California. Although the exact cause of death was not immediately known, it was readily apparent that Sgt. Handy had suffered massive trauma to his head and face.

Approximately three weeks after the murder, the petitioner, a Master Sergeant (E-7) in the United States Air Force, after failing a polygraph test, became the primary suspect in the murder. The petitioner was arrested and placed in pre-trial confinement. While the petitioner was in pre-trial confinement a letter in which another person confessed to committing the murder was found in a prison van. The letter was a hand-written statement from a third party known only as "Michael" who claimed that it was he and several others that killed Joe Handy. Investigators found no evidence indicating that the petitioner authored the letter. The petitioner's handwriting and that in the letter are very different. (App.Ex. XXVIII, Atch 2 and Atch 3). The tests of the questioned documents examiner were inconclusive. (App.Ex. XXVI, paragraph 8). The only identifiable fingerprints on the letter were those of

law enforcement agents. (*Id.*, paragraph 5). At the time of trial Michael had not been located.

On various dates in February and April 1990, the petitioner was tried by a general court-martial composed of officer members at George Air Force Base, California. The military judge who presided over petitioner's trial refused to admit into evidence the exculpatory letter written by Michael. Thus, contrary to the petitioner's pleas, he was convicted of murder in violation of Article 118 [10 U.S.C. § 918] and assault with intent to inflict grievous bodily harm in violation of Article 128 [10 U.S.C. § 928].[1] He was sentenced to a dishonorable discharge, confinement for the rest of his natural life and reduction to airman basic (E-1).

On appeal, *inter alia*, the appellant raised the issue of whether he was deprived of his due process right to present a defense when the military trial judge excluded from evidence the letter in which another person admitted to committing the murder for which the appellant was convicted. The Air Force Court of Military Review denied the request for relief in their opinion dated 26 August 1991. (Appendix B).

The Court of Military Appeals granted review of that decision on 22 May 1992. The Court subsequently, on further consideration affirmed the decision of the United States Air Force Court of Military Review. (Appendix A.)

REASONS FOR GRANTING THE WRIT

The petitioner was denied a fundamental constitutional right of due process when the military judge who presided over his trial denied the admission of what amounted to exculpatory and exonerating evidence. Even if the letter in this case did not fit squarely into a traditional

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[1] The petitioner was charged with premeditated murder but the court members found him guilty of murder without premeditation.

hearsay exception since the author of the letter was never located, fundamental constitutional principles dictate that the evidence be available for the fact finder to weigh with all the other evidence in the case:

> [W]here constitutional rights directly affecting the ascertaining of guilt are implicated the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers v. Mississippi, 410 U.S. 284 (1973). Those rights are implicated here.

In *Washington v. Texas*, 388 U.S. 14 (1967), this Honorable Court held that the right to present a defense is a fundamental element of due process of law. In that case two Texas statutes prohibited the testimony of witnesses who were involved in the same crime as that charged against the accused. This Court found that the statutes at issue unconstitutionally impeded the right to present a defense. *Id.*, at 18-19.

In *Chambers* this Court expanded the right to present a defense to include the presentation of hearsay which has sufficient indicia of reliability but does not technically fall within a hearsay exception. The hearsay exception involved was the declaration against interest. This Court concluded that no reason exists to exclude exculpatory hearsay evidence having indicia of reliability simply because it does not fit within a recognized exception to the hearsay rules.

A review of the applicable case law demonstrates that three primary reasons are cited in those cases where residual hearsay offered by an accused has been excluded. First, the hearsay is not reliable. *See Ferreira v. Fair*, 732 F.2d 245, 248 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984) (statement not against interest when made and not corroborated). Second, the evidence is not vital to the defense theory. *See Sharlow v. Isreal*, 767 F.2d 373, 376-80 (7th Cir. 1985), *cert. denied*, 475 U.S.

1022 (1986). Third, the hearsay declarant is available to testify. *See United States v. Chanya,* 723 F.2d 374 (5th Cir.), *cert. denied,* 466 U.S. 943 (1984). None of these conditions exist in the case *sub judice.*

The evidence in this case establishing the indicia of relability mandated admission of the exculpatory letter under the residual hearsay exception especially when viewed in the context of the petitioner's fundamental constitutional right to present a defense. The trial judge, the Air Force Court of Review and the United States Court of Military Appeals erred by finding the indicia of reliability insufficient to allow submission of the letter to the fact finder.

First, statements in the letter were factually correct. The letter states that the victim's father was deceased; this is true. The letter states that the victim's brother was killed; the victim's brother died in a fire in 1988. The letter states that the victim was under investigation for child molestation; this was true. (App.Ex. XXVIII, Atch 2; App.Ex. XXIX).

Second, the events described in the letter are corroborated by other evidence. The letter describes a weapon with a star on the shaft as being used in the killing of Sgt Handy. Only the baseball bat was recovered. Dr. Root, the forensic pathologist, called by the prosecution, testified that he did not believe that a baseball bat alone caused the injuries and that definitely more than one weapon was used. (R. 880, 883). Dr. Root had performed over 20,000 autopsies in his career and stated he had never seen anything quite like the injuries in this case from blunt force alone. (R. 867). The prosecution's case was solely based upon a theory of a blunt force mechanism caused by the petitioner acting alone.

Dr. Root also testified that the injuries could have been caused by more than one person. (R. 884). The letter states that persons other than the petitioner killed

Sgt Handy. A criminalist with the U.S. Army Crime Laboratory compared a bloody shoe-print found on the victim's shirt with the prints of shoes taken from the petitioner; he found no similarities. (App.Ex. XXVI, paragraph 9). The letter says the killers wore some type of star on the cheek. The petitioner testified that the killers wore star-shaped earrings. (R. 1122). An earring back was found at the crime scene. (R. 687). The floor where the earring was found had been thoroughly cleaned the night of the murder, prior to the murder. The janitor who cleaned the floor testified that his cleaning would have picked up the earring if it was there when he cleaned. (R. 1018).

Third, investigation of the letter's source disclosed no evidence of fabrication. Investigators took handwriting exemplars from all persons who were told about the killing by the petitioner. A questioned documents examiner was unable to determine the author of the letter. (App. Ex. XXVI, paragraphs 7 and 8).

Fourth, investigators found no evidence indicating that the petitioner authored the letter. The petitioner's handwriting and that in the letter are very different. (App.Ex. XVIII, Atch 2 and Atch 3). The tests of the questioned documents examiner were inconclusive. (App.Ex. XXVI, paragraph 8). The only identifiable fingerprints on the letter were those of law enforcement agents. (*Id.*, paragraph 5). The Air Force Court of Review not only engaged in fanciful speculation but totally ignored the evidence when it held that "the timing and location of its discovery suggests one plausible theory which is that the appellant placed the letter in the military van, perhaps under the rear of the driver's seat of the vehicle, and it finally worked its way forward on the day of its discovery." *United States v. Burks*, ACM 28760 (A.F.C.M.R., 26 August 1991), at 5. (Appendix B).

The fact of the matter is that the appellant had absolutely no opportunity to plant the letter. The prosecution

stipulated that the individual in charge of the confinement facility would tesify to this fact. (App. Ex. XXVI, paragraph 3). The appellant was in handcuffs and in the company of a guard and other prisoners at all times on the morning the letter was found. It also is quite incredible that a letter can "work its way forward" the entire distance under the seat of a van, across the front floorboard and lodge itself under a brake pedal. It is particularly incredible considering on base driving speeds and the fair presumption that the confinement officer was not driving a government van full of prisoners in an erratic manner.

Fifth, the letter talked extensively about Sgt Handy's homosexuality. Special Agent (SA) Filipiak testified that in his investigation several people told him that Sgt Handy had feminine characteristics (R. 686) and an Electronic Mail message found on Sgt Handy's computer did lend some credence to the fact that he may have been a homosexual.

Sixth, the letter states that a group of homosexuals which had formed somewhat of a cult had killed Sgt Handy. SA Filipiak testified that through his training and experience homosexual murders are often associated with violent deaths in which they frequently mutilate the face. (R. 685). No one could dispute that Sgt Handy's face was severely mutilated.

Lastly, the author of the letter regrets that his "brothers" threatened the petitioner and his family. (App.Ex. XXVIII, Atch 1 at page 4). Major Merijeanne Moore, an Air Force psychiatrist, conducted extensive clinical evaluation and testing of the petitioner. She concluded that the petitioner's personality is such that he would falsely confess to a crime if he were protecting someone whom he felt an obligation to protect. She also concluded that the petitioner is unlikely to commit a crime of violence such as that in this case. (R. 1068). The

petitioner testified that the killers threatened to injure his children if he said anything about them within four weeks of the murder. (R. 1104, 1115, 1125, 1133-34).

These facts combined with the fact that there was an extremely psychologically coercive environment leading up to and surrounding the petitioner's confession explain why petitioner may have admitted to committing a crime he did not commit. More pertinently, these factors establish *why another explanation for the murder should have gone to the jury.*

Thus, all the indicia of reliability mentioned above mandated the admission of the letter under the residual hearsay exceptions. Mil. R. Evid. 803(24) and 804(b)(5).

In addition to having indicia of trustworthiness, for admissibility under the residual hearsay exception the evidence must also satisfy three additional criteria. First, the evidence must be relevant. Second, the evidence must be more probative on the point than other evidence available to the proponent. Third, the general purposes of the rules and the interests of justice support admission of the evidence. Mil. R. Evid. 803(24). The relevance of the letter is undisputed. The second and third criteria compel admission of this letter.

The military judge found that another form of evidence available to the petitioner was just as probative as the letter: the petitioner could testify. (R. 63). The reasoning of this conclusion fails for several factual and legal reasons.

The alternative given the petitioner by the military judge violates the petitioner's constitutional right not to testify. A servicemember may assert his right not to testify "without fear of exploitation." *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983). The petitioner's testimony was the only alternative mentioned by the military judge in deciding that other forms of proof

equally as probative of the letter were available to the petitioner. Even assuming that the petitioner had the same substantive knowledge of the facts as the author of the letter, the military judge in effect forced the petitioner to either testify or forego presentation of the evidence. This dilemma "exploits" and renders meaningless the right not to testify.

Furthermore, no evidence exists to show that the petitioner could competently testify about the matters referenced in the letter. The author of the letter was purportedly the victim's homosexual lover who knew why the other members of the homosexual group wanted to kill the victim. The petitioner certainly does not have such firsthand knowledge.

The military judge's exclusion of the letter because other equally probative evidence was available to the petitioner is legally and factually erroneous. The letter corroborates the petitioner's retraction of his confession. The military judge's conclusion that the petitioner's testimony would be equally as probative as the letter places the petitioner in the untenable position of corroborating himself. This defies reason. In addition, a letter written by a third party exonerating the accused will almost always be more probative on the point than the accused's own testimony. This is true because, as prosecutors are always quick to point out, the accused has a greater motive to lie than anyone else. Thus, the letter was critical to corroborating the petitioner's retraction of his confession. Finding that the petitioner could testify as an alternative to admission of the letter impermissibly compelled the petitioner to either testify or forego presentation of evidence contained in the letter. On both grounds the finding is incorrect.

Finally, the purposes of the rules and the ends of justice support admission of the letter. The Military Rules of Evidence should be construed to secure fairness and pro-

mote ascertaining the truth. Mil.R.Evid. 102. This letter was critical to the petitioner's defense. Once reliability is indicated the fact-finder should have the opportunity to evaluate the evidence and either accept or reject it.

In *Pettijohn v. Hall*, 599 F.2d 476, 481 (1st Cir. 1979), the court stated:

> If the Supreme Court cases of *Washington v. Texas* . . . and *Chambers v. Mississippi* . . . mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury.

This Honorable Court has long recognized the fundamental right of a criminal accused to present evidence which is relevant, material and favorable to his defense. *See, United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Davis v. Alaska*, 415 U.S. 308 (1974).

Moreover, the exclusion of this critical evidence cannot be deemed harmless beyond a reasonable doubt. Numerous witnesses testified concerning the petitioner's peaceful character. (R. 991, 995, 1004, 1015). When the evidence which corroborates the authenticity of the letter is combined with the factual background leading up to the confession (which supported a credible argument of psychological coercion) and the evidence concerning why the petitioner might have confessed to a crime he did not commit, admission of the letter could have caused the members to have a reasonable doubt of the petitioner's guilt.

The trial judge's final conclusion that any possible probative value of the letter is substantially outweighed by the danger of confusion of the issues (R. 64) is puzzling. The letter directly paralleled the petitioner's testimony and the defense's theory of the case. The court members would have either believed the letter or not believed it but they certainly would not have been confused by it.

Petitioner therefore asks that he be afforded a fair trial and that this Court demand that the trier of fact be properly provided with all the relevant evidence so that the decision at the trial level is made in light of a fair assessment of all the available evidence. The court-martial should have had the opportunity to consider the letter. Due process and fundamental fairness demands it.

CONCLUSION

Most evidentiary issues litigated before courts across the land involve some aspect of the issue of whether prosecution evidence was properly admitted against an accused. This case is unique in that it deals with whether an accused should have been permitted to present exculpatory evidence in his defense. To deny a criminally accused such a right in a military court runs afoul of the most basic and fundamental of constitutional principles. Indeed the right to present a defense is the cornerstone of Anglo-American jurisprudence. One of the distinguishing features of tyrannical government is the accused's lack of a right to present an effective defense.[2] The petitioner was denied the opportunity to present an effective defense by the military judge's exclusion of critical exculpatory evidence. Even accepting the premise that there may have been a question as to the admissibility of the evidence, the question should have been resolved in favor of the petitioner. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967).

In excluding the exculpatory letter from evidence the military judge effectively predetermined the petitioner's guilt and took the trial out of the jury's hands. When a trial judge fears that a jury receives exculpatory evidence the trial judge has usurped the function of the jury. In-

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[2] Edward J. Imwinkelried, *Exculpatory Evidence* (1990).

deed "the manifest destiny of evidence law is a progressive lowering of the barriers to truth." [3]

The petitioner does not now ask that this Honorable Court fully exonerate him and wipe the slate clean. The petitioner only asks that this Honorable Court allow him a fair trial where exculpatory evidence is not hidden from the jury. No one except one who has predetermined guilt should fear that a jury will receive all the relevant evidence. The petitioner's final plea therefore, as he faces incarceration for the rest of his natural life, is only that this Honorable Court allow a jury to see all the evidence in this case.

Respectfully submitted,

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[3] Charles T. McCormick, *Handbook of the Law of Evidence* (1954).